

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
C.E. TAYLOR OIL, INC.)	
d/b/a DUBOIS SHELL FOOD MART #21)	PERMIT NO. DL19-23469
5404 EAST MAIN)	
DUBOIS, INDIANA 47527)	
)	
Applicant.)	

**PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. BACKGROUND OF THE CASE

C.E. Taylor, Inc. d/b/a Dubois Shell Food Mart #21 (“Applicant”), located at 5404 East Main, Dubois, Indiana 47527, permit number DL19-23469, is the Applicant for a type 107¹ Alcohol & Tobacco Commission (“Commission”) permit. The application was assigned to the Alcoholic Beverage Board of Dubois County (“Local Board”). The Local Board held a hearing on November 5, 2007 and voted 4-0 to recommend denial of the application. The Commission adopted the Local Board’s recommendation on November 20, 2007.

The Applicant filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on January 15, 2007 and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The Hearing Judge, having reviewed the tape-recorded transcript of the Local Board hearing (“LB Hearing”), the evidence submitted to the Commission during the appeal hearing (“ATC Hearing”), and contents of the entire Commission file (“ATC File”),

¹ Beer (grocery) dealer located in an unincorporated area.

now tenders her Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the Local Board in favor of the Applicant in this cause:

1. Scott Bennett, District Supervisor for the Applicant; and,
2. Darlene Wininger, Manager for the Applicant.

B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

None.

C. The following individuals testified before the Local Board against the Applicant in this cause:

1. John Fuhs, Competitor;
2. Dennis Terwiske, Competitor;
3. Anna Schwenk, Competitor;
4. Virgil Mathies, Competitor; and,
5. Laverne Mathies, Competitor.²

D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

1. Letter from Gerald and Shirley Terwiske in opposition; and,
2. Petition in opposition with forty two (42) signatures.

III. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Jeff McKean, Attorney for the Applicant; and,
2. Scott Bennett, District Supervisor for the Applicant.

B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. *Summary*, Dubois Shell Food Mart #21 Commission Information Sheet;
2. Photographs of exterior of proposed permit premises;
3. *Summary*, C.E. Taylor Oil, Inc. Financial Data – Sales Summary;

² An unknown competitor also remonstrated but was unable to be identified from the recording of the LB Hearing.

4. Photographs of interior of proposed permit premises;
5. *Summary*, grocery items sold at proposed permit premises;
6. Petitions in support with one hundred twenty (120) signatures;
7. Mapquest map – Dubois County, www.mapquest.com;
8. *Summary*, Circle A Food Mart #107 Commission Information Sheet;
9. Mapquest map – Celestine, Indiana, www.mapquest.com;
10. Mapquest map – distance from Dubois to Jasper, Indiana, www.mapquest.com;
11. C.E. Taylor Oil, Inc. policy statement concerning alcoholic beverage laws;
12. *Schedule* – Upcoming server training programs offered by Indiana State Excise Police District #5;
13. Photographs of Security features installed in Dubois Shell Food Mart #21;
14. *Summary*, birth date and hire date of Dubois Shell Food Mart #21 employees;
15. Transcript of the LB Hearing on November 5, 2007;
16. Local Board Voting Sheet for the LB Hearing on November 5, 2007;
17. Listing of Remonstrators for the LB Hearing on November 5, 2007;
18. Petitions in opposition with forty two (42) signatures;
19. Letter from Gerald and Shirley Terwiske in opposition;
20. *Summary*, BJ's & Moore Commission Information Sheet;
21. *Summary*, Butchie's Western Saloon & Family Restaurant Commission Information Sheet;
22. *Summary*, Mathies Cafe Commission Information Sheet;
23. *Wine & Spirits Wholesalers of Indiana, Inc. v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17 (Ind. Ct. App. 1990);
24. *Standifer v. State of Indiana*, 718 N.E.2d 1107 (Ind. 1999);
25. *Commission Findings of Fact and Conclusions of Law*, Mac's Convenient Store, Permit No. DL79-21223 (2005);
26. *Commission Findings of Fact and Conclusions of Law*, Casey's Enterprises, LLC, Permit No. DL34-20256 & DL34-20253 (2005);
27. *Commission Findings of Fact and Conclusions of Law*, Casey's Enterprises, LLC, Permit No. DL84-20757 (2005);
28. *Commission Findings of Fact and Conclusions of Law*, American Oil Company, Inc., Permit No. DL49-18873 & DL49-18879 (2005); and,
29. *Commission Findings of Fact and Conclusions of Law*, American Oil Company, Permit No. DL41-18884 (2002).

C. The following individuals testified before the Commission against the Applicant in this cause:

None.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

None.

IV. FINDINGS OF FACT

1. The Applicant, C.E. Taylor Oil, Inc. d/b/a Dubois Shell Food Mart #21, 5404 East Main, Dubois, Indiana 47527, permit number DL19-23469, is the applicant for a type 107 Commission permit. (ATC File).

2. The Applicant maintains a reputation for decency and law obedience in the community in which it conducts business. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10. (ATC Hearing).

3. There is a need for the services of the Applicant at the proposed permit premises. 905 IAC 1-27-4(a). (ATC Hearing).

4. The neighborhood and community desire to receive the services of the Applicant at the proposed permit premises. 905 IAC 1-27-4(b). (ATC Hearing).

5. The services of the Applicant at the proposed permit premises would have a positive impact on the neighborhood or community in which it is proposed to be located. 905 IAC 1-27-4(d). (ATC Hearing).

6. The proposed permit premises is more than 200 feet (200') from a church or school. Ind. Code § 7.1-3-21-11. (ATC File).

7. The Applicant sells milk, bread, meat, eggs, cereals, canned goods, condiments, boxed goods, salad dressing, pickles, soft drinks, coffee, pet foods, crackers, chips, juices, beauty aids, toiletries, cookies, paper products, butter, dairy products, sugar, flour, cooking oil, cake mixes, peanut butter, pizzas, frozen dinners, ice cream, cottage cheese, bacon and other items customarily found in a grocery store. (ATC Hearing).

8. The proposed permit premises is not in a residential district as referred to in Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1. (LB Hearing and ATC Hearing).

9. The Applicant's current annual non-taxable gross grocery sales are expected to be at least One Hundred Sixty Three Thousand Two Hundred Sixteen Dollars (\$163,216.00). (ATC Hearing).

10. Sixty Seven Percent (67%) of the Applicant's total inventory is devoted to grocery items; and, only Thirty Three Percent (33%) of the Applicant's total inventory is devoted to gasoline. (ATC Hearing).

11. A substantial portion of the business carried on or to be carried on at the proposed permit premises is in the nature of the Applicant's main business function as a grocery/convenience store. Ind. Code § 7.1-3-1-19. (ATC Hearing).

12. The Applicant's business satisfies the "character of business" test. (LB Hearing and ATC Hearing).

13. The Applicant has not been charged or convicted with any tobacco violations in the past three (3) years. (ATC Hearing).

14. The Applicant's stores are similar to stores of competitors holding alcoholic beverage permits in Indiana. (ATC Hearing and ATC File).

15. The Applicant submitted one hundred twenty (120) signatures of persons in favor of the issuance of the permit and who frequent the business of the Applicant. (ATC Hearing).

16. The proposed permit premises is the only grocery store in Dubois. (ATC Hearing).

17. The closest grocery store to the proposed permit premises is Circle A Food Mart #107 which is approximately six (6) miles away. (ATC Hearing).

18. The Local Board's proffered basis for denial of the permit on the Local Board Voting Sheet was (i) "no need for services"; and (ii) "neighborhood and community do not desire to receive services at the above location"; however, no remonstrators appeared at either the LB Hearing or the ATC Hearing to remonstrate against issuance of the permit other than local competitors. (LB Hearing).

19. Competitors clearly have a bias in favor of minimizing competition. (LB Hearing).

20. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the

Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

6. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

7. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10.

8. Applicant is of good moral character and in good repute in the community in which it does business and is qualified to hold the permit it seeks. Ind. Code § 7.1-3-4-2(a)(2)(A).

9. The proposed permit premises are not in a residential district. Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1.

10. The proposed permit premises are more than 200 feet (200') from a church or school. (ATC File). Ind. Code § 7.1-3-21-10 and Ind. Code § 7.1-3-21-11.

11. The Applicant is not disqualified from holding a Commission beer grocery permit. Ind. Code § 7.1-3-4-2 and Ind. Code § 7.1-3-5-2.

12. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

13. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*

14. “Need” means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).

15. “Desire” means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

16. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

17. Competitors asserting loss of business or loss of profit lack the requisite standing to object before the Commission. *Wine & Spirits Wholesalers of Indiana, Inc. v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17, 20 (Ind. Ct. App. 1990).

18. Further, “[a] witness's bias, prejudice or ulterior motives are always relevant in that they may discredit him [or her] or affect the weight of [the] testimony.” *Standifer v. State of Indiana*, 718 N.E.2d 1107, 1110 (Ind. 1999) quoting *Pfeffercorn v. State of Indiana*, 413 N.E.2d 1088, 1089 (Ind. Ct. App. 1980).

19. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).

20. There is a need for a beer grocery permit at the Applicant's location. 905 IAC 1-27-4 (a).

21. The neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant's location. 905 IAC 1-27-4(b)

22. The Commission may issue an alcoholic beverage permit to the proprietor of an establishment when it appears to the satisfaction of the Commission that a substantial portion of the business carried on at the permit premises is in the nature of the applicant's main business function in the premises. Ind. Code § 7.1-3-1-19. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 829 (Ind. App. 1982).

23. The Commission may issue a beer grocery permit to an applicant when a substantial portion of the applicant's business in the premises is in the nature of a grocery store. Ind. Code § 7.1-3-5-2; Ind. Code § 7.1-3-1-19. *Id.*

24. The phrase "in the nature of the applicant's main business function" as applied in Ind. Code § 7.1-3-1-19 to grocery stores means the retail sale of products typically found in an Indiana grocery store. See *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 832 (Ind. App. 1982).

25. The term "grocery store", in common usage, means a building or structure where groceries are kept for sale. *Goldstine v. State*, 103 N.E.2d 438, 442 (Ind. App. 1952).

26. The word "substantial", as used in Ind. Code § 7.1-3-1-19, means something more than a nominal amount, something more than seeming or imaginary, it does not mean fifty percent (50%) or more. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

27. The phrase "in the premises", as used in Ind. Code § 7.1-3-1-19, means a building or part of a building in which alcoholic beverages are authorized to be kept or sold. Ind. Code § 7.1-1-3-20.

28. Where an applicant carries and sells a large number of non-taxable grocery items as well as ordinary household products and miscellaneous items not inconsistent with the

sales of a typical grocery store, such sales are substantial within the meaning of the "character of business" test. Ind. Code § 7.1-3-1-19.

29. The Applicant has established that a substantial portion of its business at the proposed permit premises is in the nature of a grocery store.

30. The Applicant has submitted substantial evidence that it meets the "character of business" test for a grocery store and is qualified to hold a Commission Type 107 beer grocery permit.

31. The law does not permit the denial of an alcoholic beverage permit because an applicant sells fuel and oil products. *Kocolene Oil Corporation v. Indiana Alcohol and Tobacco Commission*, Cause No. CV781-322 (1984).

32. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; *See also, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 831 (Ind. App. 1982).

33. To deny the application to Applicant while granting other similarly situated applicants' applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.

34. The Local Board denied this application without sufficient evidence to support a finding that this permit should not be issued.

35. A local board's recommendation is clearly erroneous when there is a lack of substantial evidence to support the recommendation. Ind. Code § 7.1-3-19-11.

36. The Commission may decline to follow the recommendation of a local board where the recommendation is not based upon substantial evidence. *Id.*

37. The Applicant has submitted substantial evidence that it is qualified to hold a Commission Type 107 grocery beer permit. (LB Hearing and ATC Hearing).

38. The Commission may reverse a local board's action in denying an application for a permit if it finds that the local board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.

39. The Local Board's action in denying the application of the permit of this Applicant in this matter was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; and/or (e) unsupported by substantial evidence.

40. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the finding of the Local Board to recommend denial of the permit application of the Applicant in this matter was arbitrary and capricious, not based on substantial evidence and contrary to law and cannot be sustained. It is further Ordered, Adjudged and Decreed that that the evidence adduced at the ATC Hearing was in favor of the Applicant and against the recommendation of the Local Board. The appeal of Applicant, C.E. Taylor Oil, Inc. d/b/a Dubois Shell Food Mart #21, 5404 East Main, Dubois, Indiana 47527 for the application of this Type 107 permit no. DL19-23469

is approved, the recommendation of the Local Board in this matter is reversed, and the permit applied for herein is hereby GRANTED.

DATED: February 13, 2008

U-Jung Choe, Hearing Judge